In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 727

DR. ANDREW C. IVY, PETITIONER

v.

NICHOLAS KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES and EDWARD V. HANRAHAN, UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF ILLINOIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (App. B 1-5) is not yet reported. The opinion of the district court (App. A 41-49)[1] is not reported.

[1] "App. A" refers to petitioner's appendix filed in the court of appeals. "App. B" refers to the opinion of the court of

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1965. The petition for a writ of certiorari was filed on November 5, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether petitioner's action to enjoin a criminal prosecution (now in the midst of trial) was properly dismissed.

STATEMENT

On March 31, 1965, the United States District Court for the Northern District of Illinois dismissed a complaint which asked that the Attorney General and the United States Attorney be ordered to discontinue the criminal prosecution of petitioner until after an equity court had conducted a clinical test of Krebiozen, an alleged cure for cancer which is involved in the criminal case (App. A 41-50). The action was brought after indictment but before trial. The trial was not stayed and is currently proceeding, with the government having already rested its case. The district court's dismissal of the complaint was affirmed by the court of appeals.

The indictment against petitioner, three other individuals, and a corporation charges the giving of false

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appeals filed with this petition. "Ex. A" refers to the criminal indictment which is on file with the Clerk of this Court. "G. App." refers to the government's appendix filed below.

information to an agency of the United States (18 U.S.C. 1001), using the mails to defraud (18 U.S.C. 1341), violations of the Federal Food, Drug, and Cosmetic Act and conspiracy to commit these offenses (Ex. A). Petitioner is named in 43 substantive counts (counts 4-41, 45-49) and the conspiracy count (count 1) (Ex. A 1-6, 11-72, 79-85). The indictment charges, *inter alia*, that false information was given to the Food and Drug Administration regarding case histories,[2] that the drug was mislabelled as to cost of production,[3] and that the drug was transported interstate without complying with the regulations of the Secretary of Health, Education and Welfare with respect to new drugs.[4]

Before bringing the present action, petitioner had sought, in December 1964, to enjoin the Secretary of Health, Education and Welfare and others from enforcing the new drug provisions of the Federal Food,

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[2] Count 4 (Ex. A p. 11-13) is an example of such a charge. The count alleges that petitioner stated that a cancer patient died on October 15, 1953 when in fact she died on November 18, 1956. Other false statements as to treatment with Krebiozen are charged in other counts (*e.g.*, counts 5, 6).

[3] Cost of production was stated to be $9.50 per ampule. The indictment (count 8, *e.g.*) charges that the cost, using petitioner's method, is less than 25¢ per ampule. The brochures stated that the drugs were sold for cost and were to be used solely for investigation.

[4] *E.g.*, count 7, which is typical, charges an interstate shipment without approval of an application for a new drug. It alleges the shipment of the drug to a doctor for a patient with both lungs removed (a condition resulting in almost immediate death) who thus could not be used for investigation of the drug.

Drug and Cosmetic Act (21 U.S.C. 331(a)(d)(f), 333(b), 352(a) and 355(a) & (i)) in relation to him and Krebiozen, alleging that they were unconstitutional as applied. This complaint was dismissed on December 11, 1964 on the ground, *inter alia*, that the Secretary's ban on further shipment of Krebiozen was not unconstitutionally discriminatory since petitioner had failed to file the requisite notice and had failed to follow the procedure proscribed for experimental use (see *Ivy* v. *Celebrezze et al.*, G. App. 1-21). No appeal was taken.

Petitioner, in the instant case, alleged that the "unconstitutional" act of the Secretary must be imputed to the respondents since they are designated as his attorneys by statute. He asserted that the only way he can obtain a fair trial of the criminal case is to have an equity court itself conduct a clinical test of the effectiveness of Krebiozen since the issues are too complex for a jury (Pet. 15-16).

ARGUMENT

Petitioner is attempting to halt a criminal trial in order to have one issue—the effectiveness of Krebiozen—tested by an equity court. The lower courts have applied the settled rule that "a court of equity will rarely enjoin criminal prosecutions which might be brought in the future and will almost never enjoin a pending criminal prosecution" (App. A 43-44). See *Douglas* v. *Jeannette*, 319 U.S. 157; *Cleary* v. *Bolger*, 371 U.S. 392, 397. This Court has stated that the "maxim that equity will not enjoin a criminal prosecu-

tion summarizes centuries of weighty experience in Anglo-American law." *Stefanelli* v. *Minard*, 342 U.S. 117, 120. The principle has often been applied to attempted restraints of federal prosecutions, contrary to petitioner's suggestion that it rests solely on considerations of comity (Pet. 13). See, *e.g.*, *Steiner* v. *Hocke*, 272 F. 2d 384 (C.A. 9); *Campbell* v. *Medalie*, 71 F. 2d 671 (C.A. 2), certiorari denied, 293 U.S. 592.

To be sure, in rare instances special circumstances may warrant a departure. See *Dombrowski* v. *Pfister*, 380 U.S. 479 in which the enforcement of a State's subversive control act was enjoined because the statute was unconstitutional on its face and its enforcement would have a chilling effect on First Amendment rights. In the instant case there are no remotely comparable circumstances. Petitioner acknowledges that he is not challenging the constitutionality of the statutes upon which the indictment is founded (Pet. 14). Rather, he claims that the Secretary of Health, Education and Welfare exceeded the constitutional limits of his power and that this abuse is imputed to the respondents. This argument is specious. An injunctive action alleging unconstitutional acts of the Secretary of Health, Education and Welfare was dismissed for failure to state a claim upon which relief could be granted. *Ivy* v. *Celebrezze et al.* (G. App. 1-21).[*] There was no appeal. Moreover, the actions of

[*] Since the only alleged unconstitutional actions are those of the Secretary of Health, Education and Welfare, who does not control the prosecution, this is an action against federal officials in the performance of their official acts. It is thus an action against the United States without its consent.

respondents in prosecuting petitioner are discretionary acts which are not controlled by the Secretary of Health, Education and Welfare. 28 U.S.C. 507. See *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599.

Even if Krebiozen could be proved effective by the extraordinary method suggested by petitioner, there would be no reason to enjoin the criminal case. Many of the counts charge the distribution of Krebiozen without an approved new-drug application. Others charge mislabeling and misrepresentation as to the cost of production. Still other counts allege that false information was given to the Food and Drug Administration in regard to case histories. A clinical test of Krebiozen would have no bearing on these counts and could provide no justification for the acts charged.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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